IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 872 OF 1990

P.B. Samant,]
C/o. Mrs. Neelam Shah, Block 2,]
Suranga Society, Plot No. 4,]
Adarsha Society,Opp.WIT Centre,]
At & Post Panvel, Raigad District] …Petitioner

VERSUS

Union of India,]
Ayakar Bhavan, Maharshi Karve]
Road, Churchgate, Mumbai] …Respondent.

The Petitioner in person

Mr. B.A. Desai, Additional Solicitor-General, with
Mr. A.S. Khan for the Respondent.

CORAM: DALVEER BHANDARI, C.J., &
S.A. BOBDE, J.

DATE OF RESERVING
THE JUDGMENT: 24TH JANUARY, 2005

DATE OF
PRONOUNCING: 31ST MARCH, 2005

JUDGMENT (Per Dalveer Bhandari, C.J.):-

1. In this petition, it is alleged that the petitioner is an active social worker, and has filed this petition in public interest.

2. The central issue involved in this petition is that the constitutional functions of the President of India are to be exercised by the President in his discretion and not by the Council of Ministers. According to the petitioner, the President also enjoys executive powers. Constitutional functions by the President are not conferable on officers under Articles 53(3)(b) and 258 of the Constitution. According to the petition, constitutional powers of the President cannot be exercised by the Ministers under 'advice' ; these powers can only be exercised by the President in his discretion on the 'aid and advice' given to him by the Council of Ministers. It is alleged that in the matters of exercise of executive powers of the Union, the last word rests generally with the Council of Ministers and not with the President,

though rarely, he can exercise those powers 'directly' under Article 53(1) of the Constitution.

3. The petitioner has prayed that a writ of prohibition, injunction, direction or order be issued against respondent No. 1, Union of India, and Ministers, officers, and servants restraining them from exercising any constitutional powers and functions of the President under Articles 3, 76, 80(1)(a), 124, 155, 217, 263, 316, 324, 338, 356, 358, 360, 370 and 371 of the Constitution, by tendering 'advice'.

4. It may be pertinent to mention that another petition, Writ Petition No. 2954 of 1987, filed by the writ petitioner herein before the Court involving the same and/or substantially the same questions of law has already been decided by a learned Single Judge of this Court by a reasoned judgment and order dated 1st October, 1987.

5. The petitioner, aggrieved by the said judgment, preferred an Appeal, No. 146 of 1988, against the said judgment.

A Division Bench consisting of C. Mookerjee, C.J., and C.S. Dharmadhikari, J., by a comprehensive judgment, dismissed the appeal filed by the petitioner. In the judgment, the Division Bench mentioned that the petitioner before the learned Single Judge and before the Division Bench submitted that the powers under Articles 124 and 217 of the Constitution, being part of the constitutional functions, do not form part of executive powers of the Union of India, and they are not covered by Article 53(1) of the Constitution of India. The powers of appointment of Judges of the Supreme Court and the High Courts were not allocable to the Ministers either under Article 53(1) or under Article 77(1) of the Constitution.

6. The second submission of the petitioner before the earlier Division Bench was that the expression 'aid and advise' appearing in Article 74(1) of the Constitution denotes distinct and different functions. While in the discharge of his constitutional functions, the President is only aided

by his Ministers, the Ministers advise the President in discharge of his executive powers. In relation to his constitutional functions, the last word must rest with the President. While in respect of his executive functions, the President is bound by the advice tendered by the Ministers. In other words, according to the petitioner, the President, while exercising his constitutional powers, is only aided by his Ministers, but is required to act in his own discretion. The petitioner has crystallised these very submissions in this petition before this Court.

7. The petitioner, in the earlier petition, had also impleaded as respondent Nos. 2 and 3 two Judges of this Court, who were appointed by the President.

8. In the earlier petition also, the prayer of the petitioner was almost identical.

9. The Division Bench, in the previous judgment, has considered number of judgments delivered by the apex Court,

particularly the judgment in *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192. The Division Bench observed:-

> "The executive power is generally described as the residue which does not fall within the legislative or judicial powers. But executive powers may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for example in Article 123, viz., ordinance-making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making-powers are executive powers of the Union vested in the President under Art. 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or clause (3) of Article 77 is not limited in its operation to the executive action of the Government of India under Cl. (1) of Article 77.

> Similarly, clause (2) or clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under clause (1) of Article 166. The expression 'Business of the Government of India' in clause (3) of Article 77, and the expression 'Business of the Government of the State' in Cl. (3) of Article 166 include all executive business."

10. The petitioner also relied on another leading judgment of the Supreme Court in *State of U.P. v. Babu Ram*, AIR 1961 SC 751. Subba Rao, J., who delivered the majority judgment, had *inter alia* observed that the power to dismiss a public servant at pleasure was outside the scope of Article 154 of the Constitution, and, therefore, could not be delegated by the Governor to a subordinate officer and could be exercised by him only in the manner prescribed by the Constitution. In paragraph 17 of his judgment, Subba Rao, J., had *inter alia* held that Article 310 fell outside the scope of Article 154 of

the Constitution and was not part of the executive power of the State.

11. The petitioner also relied on another judgment of the Supreme Court in *R.C. Cooper v. Union of India*, AIR 1970 SC 564. The Court observed as under:-

> "Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers ….. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction."

12. Reliance has also been placed on *Jayantilal Amratlal v. F.N. Rana*, AIR 1964 SC 648. Justice J.C. Shah, who spoke for the

majority, observed that Article 258(1) of the Constitution enabled the President to entrust to the State the functions which were vested in him as the President.

13. The petitioner also relied on *Bk. Sardari Lal v. Union of India*, AIR 1971 SC 1547. In this case, the Supreme Court relied on an earlier decision in *Moti Ram v. N.E. Frontier Railway*, AIR 1964 SC 600, and held that the satisfaction mentioned in Article 311 (2) proviso (c) must be of the President himself and that the function could not be delegated or allocated by the President to anyone else. It is observed in the earlier Division Bench judgment of the Supreme Court and later judgment in *Samsher Singh v. State of Punjab* (supra) that they had over-ruled their earlier decision in the case of *Bk. Sardari Lal v. Union of India*. After analysing various judgments of the Supreme Court, the Division Bench observed that it agreed with the learned Single Judge and dismissed the appeal. Prior to rendering of the decisions in *Bk. Sardari Lal v. Union of India* and *S.P.*

Gupta and Ors. v. President of India & Ors., the submissions of the petitioner could be supported by the judicial decisions which were prevailing at that time; but thereafter, it is settled law that in appointing Judges of the Supreme Court and the High Court, the President exercises his powers with the aid and advice of his Council of Ministers.

14. The Division Bench mentioned that the expression "aid and advise" appearing in Article 74 is a constitutional phrase used besides the Constitution of India in other constitutional documents, viz., North America Act. Consistently, the expression "aid and advise" has been taken as a single phrase. The Division Bench observed that it is not possible to make a distinction amongst the executive functions of the President according to whether they are to be discharged with the aid or with advice of his Council of Ministers. Even in the matter of executive functions, the President is to be aided and advised. In relation to his executive functions, the President has both to be aided and advised. The

Division Bench observed that the expression succinctly sums up the constitutional relationship between the President and his Council of Ministers headed by the Prime Minister. By reason of the amendment in clause (1) of Article 74 by Constitution 42nd Amendment Act, 1976, the President is required to act in the exercise of his functions in accordance with such advice subject to the proviso inserted by the second amendment.

15. The petitioner, aggrieved by the said judgment of the Division Bench, filed a Special Leave Petition before the Supreme Court, and the Special Leave Petition was dismissed by the apex Court. The case attained finality. Even then, the petitioner wants to reagitate these issues before this Court in this petition after the dismissal of the Special Leave Petition. The petitioner now cannot be permitted to reagitate the same issues once again by filing this writ petition.

16. On behalf of the respondent, an affidavit dated 4th January, 2005 has been filed by the Ministry of Home Affairs, Government of India. In that affidavit, it is mentioned that this petition is vexatious, and the petitioner is guilty of abusing the process of the Court, and on this ground alone, the petition is liable to be dismissed.

17. It is further incorporated that another petition, being Writ Petition No. 2954 of 1987 filed by the petitioner before this Court involving the same and / or substantially the same questions of law, has also been dismissed by a Single Judge of this Court by the order dated 1st October, 1987. An appeal, being Appeal No. 146 of 1988, preferred by the writ petitioner herein against the said judgment of the learned Single Judge, was also dismissed by the Division Bench by the judgment dated 26th April, 1988.

18. The petitioner, aggrieved by the judgment, filed Special Leave Petition (Civil) No. 11592 of 1988 in the Supreme Court of India. The said Special Leave Petition was dismissed

by an order dated 1st February, 1989. It is submitted that the petitioner ought not to be permitted to re-agitate the issues by filing subsequent writ petition on the purported plea that that judgment rendered by the Division Bench of this Court was *per incuriam*. The plea, which was admittedly raised before the Supreme Court, has been rejected.

19. It is submitted that the averments made in paragraph 6 and at the end of paragraph 15 of the Writ Petition show the real intent and/or cause and/or reason behind filing the present writ petition, i.e., to challenge the appointment of Shri C. Subramanium as Governor of Maharashtra. It is submitted that the said cause and/or reason no longer exists as on today, and the Writ Petition ought to be dismissed having become infructuous.

20. It is also mentioned that apart from other things, the issues raised in the petition are no longer *res integra*, and have been settled by the apex Court in a number of judgments.

21. The contentions of the writ petitioner have been summarised in the counter-affidavit filed by the respondent that the President of India discharges constitutional and executive functions under the Constitution of India; the constitutional functions and/or power are separate and/or distinct from the executive power; the constitutional functions are to be exercised by the President in his own discretion and not by the Council of Ministers; these constitutional functions cannot be delegated and/or allocated to officers and Council of Ministers and the Government of India (Allocation of Business) Rules, 1961 are *ultra vires* the Constitution, inasmuch as under the said Rules, the President has allocated his constitutional functions to the Council of Ministers. This writ petitioner has enumerated certain constitutional functions of the President, such as, appointment of Governors, Judges of the Supreme Court, High Courts, etc. These constitutional functions, according to the petitioner, must be performed by the President on his own discretion and personal satisfaction and not on the basis of aid and

advice rendered by the Council of Ministers headed by the Prime Minister. According to the respondent, these contentions of the petitioner are contrary to the very basis of the Indian Constitution.

22. In *Madhav Rao Scindia v. Union of India*, reported in (1971) 3 SCR 9 at page 169, it has been held by a Bench of eleven Judges that:

> "… There is no analogy between our President and the British Crown. The President is a creature of the Constitution. He can only act in accordance with the Constitution…"

23. It is submitted that Article 74 of the Constitution, as it stands now, i.e., after 42nd and 44th Constitutional Amendments, the President is bound, in every case, be it so-called constitutional, executive or legislative functions, to act on the advice of the Cabinet.

24. It is submitted that the Constitution casts certain duties upon the President, such as, appointment of Election

Commissioners, Judges of the Supreme Court, High Courts, etc., which the President is obliged to perform. The President cannot take a decision contrary to the advice rendered by the Council of Ministers. It has been held in the said *Madhav Rao Scindia*'s case (at page 195) that:

> "…The President cannot do indirectly, what the legislature cannot do directly. It is wrong to mistake a duty for a right…."

25. In *U.N.R. Rao v. Smt. Indira Gandhi*, reported in (1971) Supp SCR 46, a Bench of five Judges of the Supreme Court has held that Article 74(1) is mandatory and the President cannot exercise his powers without the aid and advice of the Council of Ministers, with the Prime Minister at the head. It has been further held that even if the House of the People stands dissolved, such dissolution of the House does not require that the Prime Minister and other Ministers must resign, or cease to hold office, or must be dismissed by the President.

26. The respondent has mentioned that there is no difference between "constitutional functions" and "executive functions" of the President. The source of all powers is the Constitution, which provides that the President shall act on the aid and advice of the Council of Ministers. Even the legislative functions are discharged by the President on the aid and advice of the Council of Ministers. It has been held in *R.C. Cooper v. Union of India*, (1970) 3 SCR 530 at 559:-

> "Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. ….The Ordinance is promulgated in the name of the President and, in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction…."

27. The respondent, Union of India, has referred to *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 SCC 441 at 567. A Bench of nine Judges of the Supreme Court has held that thus, it is seen that the President has no discretionary powers as in the case of the Governor even though the discretionary power of the Governor is only a small strip. The President is required to perform his administrative duty under the Constitution, the performance of which requires his formal approval or seal and in respect of which nothing is left to his discretion.

28. The respondent has referred to another leading case, viz., *S.R. Bommai v. Union of India*, reported in (1994) 3 SCC 1 at 240, which reads as under:-

> "Articles 74 and 77 are in a sense complimentary to each other, though they may operate in different fields. Article 74(1) deals with the acts of the President done 'in exercise of his functions',

whereas Article 77 speaks of the executive action of the Government of India which is taken in the name of the President of India. Insofar as the executive action of the Government of India is concerned, it has to be taken by the Minister / official to whom the said business is allocated by the rules of business made under clause (3) of Article 77 for the more convenient transaction of the business of the Government of India. All orders issued and the instruments executed relatable to the executive action of the Government of India have to be authenticated in the manner and by the officer empowered in that behalf. The President does not really come into the picture so far as Article 77 is concerned. All the business of the Government of India is transacted by the Ministers or other officials empowered in that behalf, of course, in the name of the President. Orders are issued, instruments are executed and other acts done by various Ministers

> and officials, none of which may reach the President or may be placed before him for his consideration. There is no occasion in such cases for any aid and advice being rendered to the President by the Council of Ministers. Though expressed in the name of the President, they are the acts of the Government of India. They are distinct from the acts of the President 'in the exercise of his functions' contemplated by Article 74. Of course, even while acting in exercise of his functions, the President has to act in accordance with the aid and advice tendered by the Council of Ministers with the Prime Minister at its head...."

29. In another case decided by the apex Court, *R.K. Jain v. Union of India*, reported in (1993) 4 SCC 119 at page 161, the Court has observed as under:-

> "The above discussion leads to the following conclusions. The President while exercising the executive power under Article 73 read with Article 53, discharges such of those powers which are exclusively conferred to his individual discretion like appointing the Prime Minister under Article 75 which are not open to judicial review. The President exercises his power with the aid and advice of the Council of Ministers with the Prime Minister at the head under Article 74(1). They exercise the power not as his delegates but as officers subordinate to him by constitutional mechanism envisaged under Article 77 and express in the name of President as per Rules of Business made under Article 77(3)…."

30. The respondent submits that this petition is not maintainable, because on the same ground, the petitioner had filed another petition before this Court, which was dismissed.

Against that judgment, the petitioner had filed a Letters Patent Appeal, which was also dismissed by the Division Bench. The petitioner, aggrieved by the said judgment, filed a Special Leave Petition in the Supreme Court, which was also dismissed. Therefore, the petitioner cannot now be permitted to file another petition and raise similar grounds, which stand concluded by a comprehensive judgment.

31. Apart from that, even on merits, the petitioner has no case. All issues raised in the petition stand concluded by the judgments of the apex Court. Some of these judgments have been mentioned in the preceding paragraphs.

32. The petitioner, in his rejoinder to the affidavit-in-reply, denied the allegations mentioned therein. The petitioner has not been able to successfully meet the substantial grounds which the respondent has taken regarding the maintainability

of this petition, and he reiterated the averments mentioned in the main writ petition.

33. The petitioner has failed to meet the preliminary objection taken by the respondent. The admitted facts are that the petitioner filed the writ petition before this Court, and on dismissal of that writ petition, he filed a Letters Patent Appeal. After dismissal of the Letters Patent Appeal, the petitioner preferred a Special Leave Petition under Article 136 of the Constitution of India in the Supreme Court. That petition was also dismissed. The petitioner, substantially on the same grounds, has filed the present Writ Petition. The petitioner has reiterated the same points and same issues which were considered and decided by the learned Single judge, the Division Bench and the Supreme Court, and after hearing the petitioner at length, the Supreme Court dismissed the Special Leave Petition.

34. Permitting the petitioner to now urge the same issues and questions of law in a fresh petition would be total abuse of process of law, and no judgment of any Court can ever acquire finality. The settled principle of finality of the judgment must be accepted and honoured; otherwise, it would lead to total chaos and disorder.

35. In the past few years, a very unfortunate trend has developed that litigants are not satisfied with the judgments of any Court. Experience has shown that the judgments of the learned Single Judge are challenged in almost all cases before the Division Bench. Even against the judgments of the Division Bench, in a very large number of cases, Special Leave Petitions are filed and even after Special Leave Petitions are dismissed, a tendency has developed to file review petitions in almost every matter.

36. Now, we have been informed that even filing of curative petitions is also not uncommon. This is one of the main

causes of delay in the administration of justice. We are of the considered view that this tendency must be effectively curbed in the larger interest of all concerned. According to us, there are two principal reasons which have led to this trend. One reason is that except for the counsel's fees, there is hardly any expense involved in moving a Court, including the apex Court. The other reason is that even in frivolous matters, the Courts are reluctant to dismiss the petition with costs. In our considered opinion, the respondents, who are dragged into a frivolous litigation, are entitled to at least the actual costs incurred by them, if not exemplary costs.

37. On consideration of the totality of the facts and circumstances, we are of the view that this petition is totally devoid of any merit and deserves to be dismissed with costs. We order accordingly.

CHIEF JUSTICE

S.A. BOBDE, J.